



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 24, 1994

Mr. William T. Buida
Assistant General Counsel
Litigation Section
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-260

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 23113.

The Texas Department of Human Services (the "department") received an open records request for, *inter alia*,

[t]he pricing information contained in the responses to the requests for proposals regarding electronic benefits transfer. It is my understanding that the RFP was withdrawn after proposals were received and evaluated.

You seek to withhold the requested pricing information pursuant to section 552.104 of the Government Code. Further, you inform us that you have notified the vendors who submitted the proposals that they should submit written comments to this office as to why their respective pricing information comes under the protection of sections 552.104 and 552.110 of the code.

Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in commercial transactions. For example, section 552.104 is generally invoked to protect information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the

government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract.

In this instance, you acknowledge that the department rejected all proposals submitted in response to the Request For Proposals and that the department now intends to use a catalog system to procure an electronic benefits transfer system. *See generally* Acts 1993, 73d Leg., ch. 906, § 1.07 at 3816 (enacting V.T.C.S. art. 601b, § 3.081); Gen. Servs. Comm'n, 18 Tex. Reg. 6832 (1993) (codified at title 1, section 113.19, of the Texas Administrative Code). You contend that if the department were to release the pricing information from the RFP at this time one of the multiple vendors from whom the department may order catalog items would have an advantage over other vendors during the upcoming purchase procedure.

Under the newly enacted catalog purchase procedure, vendors submit a catalog that lists their products or services and the respective prices to, *inter alia*, state agencies such as the department, who may then order the products or services directly from the vendors.¹ Although this procedure specifically provides that agencies ordering from the catalogs "may negotiate additional terms and conditions to be included in contracts relating to the purchase or lease" of a vendor's products or services, *see* V.T.C.S. art. 601b, § 3.081(d), there is no similar provision that authorizes the agencies to negotiate with the vendors for a price other than the published price of the product or service.

Although pricing proposals generally may be withheld only during the bid submission process, *see* Open Records Decision No. 319 (1982) at 3 and authorities cited therein, this office has nevertheless recognized that section 552.104 may protect pricing information submitted by a successful bidder if disclosure will allow competitors to accurately estimate and undercut future bids. Open Records Decision No. 541 (1990) at 5. However, because there was no successful bidder and the department rejected both of the submitted proposals, the department now intends to obtain the components for its electronic benefits transfer system not through another RFP in which one vendor would be the sole provider of the system, but rather through the published catalogs of various vendors, thereby allowing the department, if it chooses, to obtain the materials it needs from multiple vendors at established, non-negotiable prices. Given the fact that the upcoming procurement process is substantially different from the original sealed bid process, and that the department will not be required to limit itself to only one vendor for the various materials it may need, this office does not believe that the release of the requested pricing information from the RFP would interfere with the department's interests in obtaining the most favorable price from the published catalogs. Section 552.104 does not protect the pricing information where changed circumstances surrounding the procurement process negate the commercial value of specific cost proposals. *See, e.g.,* Open Records Decision Nos. 514 (1988); 232 (1979).

¹These catalogs will be available to all state and other agencies that are located within various regions defined by the General Services Commission and that are subject to the Information Resources Management Act, V.T.C.S. art. 4413(32j). *See* V.T.C.S. art. 601b, § 3.081(b).

Section 552.110 of the Government Code excepts from required public disclosure

trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information.

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees* A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue,² or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added) (citation omitted; footnote added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret. *See* Restatement of Torts, *supra*; *see also* Open Records Decision No. 232. This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is presented, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

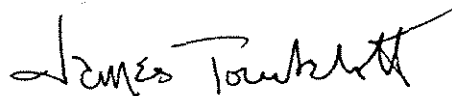
²We do not address here whether the contents of the catalogs to be distributed pursuant to section 3.081 of article 601b will constitute trade secret information.

You have submitted to this office for review the proposals of Citibank EBT Services ("Citibank") and Deluxe Data Systems, Inc. ("DDS"). Because this office has received no objections from Citibank over the release of its pricing proposal, we deem their pricing information public. However, a representative of DDS contends that its pricing information constitutes trade secret information³ and has submitted to this office his contentions as to how the information meets the six-part test as set out in the Restatement. As seen from the quote cited above, however, although technical material which relates to the substance of a proposal generally may be excepted from disclosure as a trade secret, pricing proposals are not so excepted and may be withheld only while the bid submission process is pending. *See also* Open Records Decision No. 306 (1982). Accordingly, the department may not withhold the requested information as "trade secret information."

Finally, the representative of DDS contends that the pricing information is protected from disclosure by section 552.110 as "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Although this office has previously looked to federal case law in interpreting this language, this office specifically overruled that analysis of commercial or financial information under section 552.110 in Open Records Decision No. 592 (1991). Commercial or financial information is excepted from disclosure only if it is deemed confidential by the common or statutory law of Texas. *Id.* at 7. The requested information is not confidential by statute or, as discussed above, under the common-law doctrine of trade secret. Therefore, section 552.110 does not except the information from disclosure. The department must release the pricing information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



James Tourtelott
Assistant Attorney General
Open Government Section

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³The DDS representative also contends that the information comes under the protection of section 552.104. As noted above, section 552.104 is to protect *governmental* interests in certain commercial transactions. This section was not intended to protect business entities that are in competition in the private sector. Where, as here, no governmental interests are implicated by the release of information, section 552.104 does not apply. Open Records Decision No. 541 at 5.

Ref.: ID# 23113
ID# 23393
ID# 23321
ID# 23660

Enclosures: Submitted documents

cc: Mr. C. Robert Heath
Law Offices of Bickerstaff, Heath & Smiley, L.L.P.
San Jacinto Center, Suite 1800
98 San Jacinto Boulevard
Austin, Texas 78701-4039
(w/o enclosures)

Mr. Martin Dukler
Deluxe Data Systems, Inc.
P.O. Box 12536
Milwaukee, Wisconsin 53212-0536
(w/o enclosures)